91-161

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRED WILMOT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Where neither the United States Code nor the regulations promulgated by the Department of Treasury thereunder require a bank official to file a Currency Transaction Report ("CTR") for a single-day series of transactions in currency of more than $10,000.00, when no single transaction exceeds $10,000.00, may the government, by use of an instruction on the back of a CTR form, impose a criminal responsibility to report such multiple transactions and prosecute a bank official for failing to report multiple transactions consistent with due process of law and the Administrative Procedure Act?

RULE 29.1 LIST

The petitioner, Fred Wilmot, is an individual and the requirements of Supreme Court Rule 29.1 are therefore inapplicable. In addition to Fred Wilmot, the following were also defendants in the District Court and appellees in the Eighth Circuit Court of Appeals: Farm & Home Savings Association, Thomas A. Williams, Ronald A. Meyer, Ronald Whitaker and Leon Miller a/k/a Lee Miller.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Fred Wilmot, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on May 13, 1991.

OPINIONS BELOW

On June 27, 1990, the United States District Court for the Eastern District of Missouri dismissed Counts I, III and IV of a criminal indictment charging Mr. Wilmot with conspiracy and the substantive offense of failing to file a Currency Transaction Report ("CTR")(the decision of the District Court is reprinted in the Appendix). On May 13, 1991, the United States Court of

Appeals for the Eighth Circuit reversed the decision of the district court. United States v. Farm & Home Savings Ass'n, 932 F.2d 1256 (8th Cir. 1991)(reprinted in the Appendix).

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court was invoked pursuant to 18 U.S.C. § 3231. The jurisdiction of the Eighth Circuit Court of Appeals was invoked pursuant to 18 U.S.C. § 3731. The decision of the United States Court of Appeals for the Eighth Circuit was filed on May 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

"No person shall . . . be deprived of life, liberty or property without due process of law." U.S. Const. amend. V.

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

31 U.S.C. § 5313(a).

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through or to such financial institution, which involves a transaction in currency of more than $10,000.00. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

31 C.F.R. § 103.22(a)(1) (before 1987).

> Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institutionwhich involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

31 C.F.R. § 103.22(a)(1) (after 1987).

STATEMENT OF THE CASE

On September 13, 1989, defendant Fred Wilmot was indicted and charged in three counts of a five count indictment. Count I charged a violation of 18 U.S.C. § 371 as a conspiracy to conceal material facts from the United States in violation of 18 U.S.C. § 1001 by failure to file Currency Transaction Reports ("CTR's") in violation of 31 U.S.C. § 5313 and 31 C.F.R. § 103.22. Count I involved both the Dallas, Texas transactions on September 26, 1984 and St. Louis transactions on November 28, 1984.

Wilmot was also charged in Count II with concealing material facts from the United States in violation of 18 U.S.C. § 1001 by failing to file CTR's in violation of 31 U.S.C. § 5313 and 31 C.F.R. § 103.22. Count II referred only to transactions occurring in Dallas, Texas and was properly dismissed for lack of venue by the District Court. Count II is not now before this Court. Mr. Wilmot was also charged in Count V with perjury in violation of 18 U.S.C. § 1623. Count V remains pending before the District Court and is not now before this Court.

By way of superseding indictment issued on November 8, 1989, Mr. Wilmot was added as a defendant in Counts III and IV. Count III charged a direct violation of 31 U.S.C. § 5313 and 31 C.F.R. § 103.22 alleging Wilmot failed to file CTR's with respect to the St. Louis transactions. Count IV charged Mr. Wilmot with concealing material facts from the United States in violation of 18 U.S.C. § 1001, by failing to file CTR's in violation of 31 U.S.C. § 5313 and 31 C.F.R. § 103.22. Again, Count IV was directed to the transactions occurring in St. Louis.

The currency transactions at issue arose from a government "sting operation" conducted in Dallas, Texas on September 26, 1984 and in St. Louis, Missouri on November 28, 1984. IRS agents Thompson, Barry and Wamser recruited defendants Williams, Meyer, Whitaker and Miller under the auspices of laundering drug money. Prior to the September 26, 1984 meeting with the agents and other defendants, Wilmot had never met any of the defendants except Meyer. Meyer had a small savings account at Farm & Home. Although the indictment alleges that defendants Meyer, Whitaker, Miller and Williams received compensation for their involvement, the indictment does not allege that Wilmot received any compensation whatsoever for his alleged involvement in this scheme.

On September 26, 1984, as alleged, Fred Wilmot was a Senior Vice President of Farm & Home Savings in Dallas, Texas.

Although he was in charge of the savings and loan operations there, Mr. Wilmot was only familiar with the loan end of the business, as opposed to the savings end. The filing of CTR forms is a function of the savings end of the business. As such, Mr. Wilmot was not familiar with the currency transaction reporting requirements.

On September 26, 1984, Wilmot was approached by defendants Meyer and Williams and Agent Thompson. With no prior warning to Wilmot, they asked about currency transaction reporting requirements at Farm & Home. Wilmot told them that his personnel would file a CTR if a transaction exceeded $10,000.00, in accordance with the regulations. However, as long as each transaction was less than $10,000.00, it was Mr. Wilmot's understanding that Farm & Home need not file a CTR.

With respect to the Dallas transactions which are contained in Count I, there are no other allegations relevant to Mr. Wilmot. He did not telephone branch personnel or otherwise pave the way for the transactions. In fact, it is only alleged that Wilmot was present at the September 26, 1984 meeting with Agent Thompson and defendants Meyer and Williams. Wilmot did not take the cash and deposit it. He merely told them that what they intended to do was proper under banking regulations.

Whereupon, and without ever telling Wilmot that his legal interpretation may be wrong and without giving or offering him any compensation whatsoever, the agents and other defendants proceeded to purchase money orders with currency in amounts less than $10,000.00 at various branches of Farm & Home in the Dallas, Texas metropolitan area. In aggregate, the purchases exceeded $10,000.00 per person per day. However, no single purchase exceeded $10,000.00.

Mr. Wilmot's only other involvement, as alleged in the indictment, was that he made a telephone call to James Besher, hiscounterpart in St. Louis. The St. Louis transactions are the subject of Counts III and IV. The indictment alleges that Wilmot phoned Besher and told him that Meyer would be coming to St. Louis (Count IV). In fact, Wilmot told Besher that Meyer would be coming to St. Louis to discuss loans for the purchase of real estate in St. Louis. Wilmot was not aware that Meyer intended to launder money, nor did he tell Besher that Meyer wanted to launder money in St. Louis.

There are absolutely no allegations that Wilmot received any compensation. There are no allegations that Wilmot was, in any way, involved in carrying out these transactions. There are no allegations that Wilmot knew the source of the money. At most, it is alleged that Wilmot was a bank vice-president, had a meeting and made a phone call. In fact, at the Dallas meeting, Wilmot only stated the law as he knew it. Thereafter, the agents and other defendants conducted the multiple transactions. Moreover, as will be seen in the Reasons For Granting the Writ, Mr. Wilmot's belief that structuring was not illegal has considerable merit.

References to Mr. Wilmot in the thirty-one page indictment are sparse indeed. For the Court's convenience they are outlined below:

> 12: Fred Wilmot was Senior Vice President of Farm & Home Savings Association and was responsible for all Farm & Home Savings Association branches in the Dallas, Texas metropolitan area.
>
> (Count I, paragraph 12.)
>
> 7. On or about September 26, 1984, Fred Wilmot, Ronald Meyer, Thomas A. Williams and Special Agent William Thompson who, at the time, was working in

an undercovercapacity, had a conversation in the office of Fred Wilmot at the north Dallas, Texas branch of Farm & Home Savings Association.

(Count I, paragraph 7 of Overt Acts.)

26. Sometime prior to on or about November 28, 1984, with the exact date unknown to the grand jury, James Besher, not named as a defendant in this indictment, had a telephone conversations with Fred Wilmot.

(Count I, paragraph 26 of Overt Acts.)

It was further a part of said scheme and device that Fred Wilmot telephoned James Besher to inform him that Ronald Meyer and other individuals would be contacting him.

(Count IV at page 21.)

The above quotes from the superseding indictment are the sum and substance of the case against defendant Fred Wilmot. All other references to defendant Wilmot are boiler plate.

REASONS FOR GRANTING THE WRIT

The statute under which the Petitioner is being prosecuted violates due process of law because neither the statute nor the regulations required the filing of a CTR for multiple single-day currency transactions totalling over $10,000 where no single transaction exceeded $10,000. The instruction on the back of the CTR purporting to impose such an obligation fails to do so because it was not properly promulgated under the Administrative Procedures Act.

This Court stated in Lanzetta v. New Jersey, 306 U.S. 451 (1939):

> No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is... "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties... And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

306 U.S. 451, 453. Criminal laws are to be strictly construed and any ambiguity is to be resolved in favor of leniency. United States v. Enmons, 410 U.S. 396 (1973). These are basic fundamental principles of American criminal jurisprudence.

Counts I, III and IV of the indictment have as their essence the claim that a Currency Transaction Report ("CTR") must be filed in this multiple transaction situation. The Secretary of Treasury was charged by Congress with the duty of prescribing regulations by which currency transactions could be monitored pursuant to 31 U.S.C. § 5313. The properly promulgated regulation

requiring the filing of CTR's is embodied in 31 C.F.R. § 103.22. Prior to 1987, 31 C.F.R. § 103.22(a) read as follows:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through or to such financial institution, which involves a transaction in currency of more than $10,000.00. (Emphasis supplied).

The regulation does not require aggregation by the bank of multiple transactions that have been structured by the customer to avoid the CTR filing requirement. The Government relies upon an instruction on the back of the CTR (Form 4789) in its attempt to impose such a burden, subject to criminal penalties, on Mr. Wilmot. The instruction states: "Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction of the financial institution is aware of them." The Government's argument that this "instruction" is sufficient to impose criminal liability on Mr. Wilmot contravenes established principles of administrative law.

If the instruction on the CTR form is viewed as a rule or regulation it cannot form the basis for prosecution because the agency failed to promulgate it with the required opportunity for notice and comment. 5 U.S.C. §§ 553(b) and 551(4); United States v. Reinis, 794 F.2d 506, 508 (9th Cir. 1986). If viewed as an interpretation by the agency of the applicable statutes and regulations, the instruction need not be enacted with notice and comment safeguards, 5 U.S.C. § 553(b)(A), but the agency cannot by such "interpretation" " 'create[]' new law 'affecting individual rights and obligations.'" State of New Jersey v. Department of Health and Human Services, 670 F.2d 1262, 1282 (3d Cir. 1981) (citations omitted). The decision of the Eighth Circuit Court ofAppeals turns a deaf ear to the due process requirements of the Administrative Procedures Act and permits

the agency to impose criminal liability on the basis of an instruction that did not properly reflect the law at the time.

Not until April, 1987 was the following language added to 31 C.F.R. 103.22 to encompass multiple single-day transactions:

> Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totaling more than $10,000.00 on any one business day.

In 1984, at the time of these transactions, Mr. Wilmot was completely unaware of any supposed aggregation requirement. He believed and told the agents that what they proposed to him was perfectly legal. This explains Wilmot's lack of involvement in the structuring of the transactions. Put simply, Mr. Wilmot merely allowed the agents and other defendants to do what he believed was completely legal.

Now, nearly six years after the events in question, after the Secretary of Treasury modified the regulations to specifically require aggregation of multiple single day transactions and after numerous judges have confronted the issue with varying outcomes, Mr. Wilmot is being charged with violating the currency transaction reporting requirements. Allowing this indictment to proceed would be an unjustifiable and unconstitutional denial of due process to Mr. Wilmot.

Obviously, the Secretary of Treasury properly promulgated new regulations to encompass structured transactions in 1987 for good reason. In fact, it did so in response to the case of United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985). In Anzalone, the First Circuit reversed Anzalone's conviction holding that the reporting act did not require disclosure of structured transactions saying "[t]he present ambiguity regarding coverage of the reporting act and its regulations has been created by the government itself." Id. at 681.

In discussing the proposed 1987 changes in the regulation, the Secretary stated:

> The Department's experience in enforcing the (Reporting) Act in recent years has indicated that the following proposed substantive regulatory changes are needed to strengthen enforcement of the act. In particular, recent judicial decisions, such as United States v. Anzalone . . . have drawn attention to the fact that the regulations may be inadequate to sustain prosecutions for failing to report transactions that had been structured to evade the current reporting requirements. In light of cases such as Anzalone, the Department of Justice believes that certain changes to the currency transaction reporting requirements are needed to expand the coverage of the act to ensure the collection of needed information and to strengthen enforcement of the Act.

51 Fed.Reg. 30233, 30234 (August 25, 1986) (emphasis added). Thus, the Secretary, as well as the Department of Justice, has conceded that the coverage of the Reporting Act, as implemented by the regulations in force in 1984, had to be expanded to reach the structured transactions situation. For the first time, in 1987, the Secretary indicated an intent to require reports for multiple same day transactions which totaled in the aggregate more than $10,000.

The Government's prosecution rests entirely on an instruction on the reverse side of the CTR form. The Government has repeatedly attempted to bootstrap this instruction, which was contained on Form 4789 in 1984, into law. However, as this Court is well aware, instructions on the back of forms are not law in and of themselves. They become law only if properly promulgated pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 et seq.; Reinis, 794 F.2d at 508. To hold otherwise would be to effectively and judicially repeal the Administrative Procedure Act.

In an attempt to save a failing indictment, the Government produced at a hearing an expert and attorney, Mr. Gary Waxman. Mr. Waxman is a desk officer for the Office of Management and Budget who administers the Paperwork Reduction Act. The Government attempted to once again bootstrap the instruction language on Form 4789 into law by arguing that it became law when Form 4789 was promulgated pursuant to the Paperwork Reduction Act. When asked whether the multiple transaction language of Form 4789 was made a matter of law by its inclusion on Form 4789 which was promulgated pursuant to the Paperwork Reduction Act, Mr. Waxman, after a long pause, replied, "My opinion is this court has an interesting question before it." (Waxman Testimony, November 17, 1989 at pp. 44-45).

The Government's own expert charged with the duty of promulgating Form 4789 and himself a lawyer, cannot conclusively decide whether a violation has occurred. How can it be that Fred Wilmot could have had any knowledge of the alleged illegality of structuring transactions five years prior to his indictment and three years prior to the amendments to the regulation?

By the Secretary's own admission, the prior regulations had not imposed an aggregation requirement. Form 4789 was not law because it had not been promulgated pursuant to the Administrative Procedure Act. In its 1986 Administrative Procedure Act Federal Register publication, the Secretary noted that the aggregation principle had not been previously codified saying that the purpose of the amendment to the regulation was to:

> (7) Clarify that financial institutions must report multiple, same-day currency transaction of which they are aware that total more than $10,000. This amendment codifies the CTR Form 4789 instructions that currently requires financial institutions to report multiple, same-day transactions of which they are aware that are by or

> on behalf of any person and total more than $10,000 . . . .

51 Fed.Reg. 30234 (August 25, 1986). The reference to "clarify" is a legally meaningless and self-serving statement as is the reference that Form 4789 requires aggregation presently.

If, as the Government contends, Form 4789, having been promulgated pursuant to the Paperwork Reduction Act, was always a matter of law, why would the Department of Treasury or Congress need to "codify" the aggregation principle? The answer is that the aggregation principle was not law in 1986 and certainly was not law in 1984 and both the Department of Treasury and Congress so recognize. In fact, it did not become law until 1987 when it was properly promulgated pursuant to the Administrative Procedure Act. See, 52 Fed.Reg. 11437, ¶ 7 and 11440, ¶ 21 (April 8, 1987). The most telling comment made by Congress is made at 52 Fed.Reg. 11440 (April 8, 1987):

> Although Treasury will need to revise the Form 4789 instructions to take the regulatory changes into account, financial institutions are advised in the interim that in the event of conflict or inconsistency between a provision of the regulations and the Form 4789 instructions THE REGULATORY PROVISIONS SHALL CONTROL.

(Capitalization and emphasis added).

In short, the instruction on Form 4789 that multiple, same-day currency transactions be aggregated and reported had not been subject to the notice and comment requirements of the Administrative Procedure Act prior to 1987. This alone should make the alleged pre-1987 form reporting requirements null and void as not having been promulgated pursuant to the Administrative Procedure Act.

The Circuit Courts of Appeal have split on whether a bank official is required to file a CTR in this situation. The Seventh and Ninth Circuits, in United States v. Risk, 672 F.Supp. 346 (S.D.Ind. 1987), aff'd, 843 F.2d 1059 (7th Cir. 1988) and United States v. Reinis, 794 F.2d 506 (9th Cir. 1986), have held that the Administrative Procedure Act prohibits the instruction on Form 4789 from having the force of law until and unless such instruction is properly promulgated. The Risk court addressed the contention as follows:

> The only apparent source of asserting that a duty exists to file a CTR in a multiple transaction situation is in a form prescribed by the Secretary of Treasury. That form provides: "Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them." Form 4789 (Department of Treasury 1980). However, that Form was not properly promulgated as an implementing rule to the statute by publication in the Federal Register. Therefore, the reliance upon this Form by other courts, either wittingly or unwittingly, was misplaced, and this court is compelled to conclude that the statute andregulations are silent as to multiple transaction situations.

Id., 672 F.Supp. at 358. As in this case, the Risk court was examining a pre-1987 structured transactions indictment.

The Seventh Circuit affirmed the dismissal of the charges by Judge Barker in United States v. Risk, 843 F.2d 1059 (7th Cir. 1988). The Seventh Circuit relied on United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987), in rejecting the Government's argument that Risk should not be allowed to use the "artifice" of structuring the transactions so that each is less than $10,000 in order to avoid the CTR statute. "We conclude that the bank had no legal duty to report the structured transaction because neither

the statute nor the Secretary of Treasury's regulations expressly required the aggregation of multiple transactions over $10,000 occurring on the same day." Risk, 843 F.2d at 1062.

Thus, the Government should not be heard to rely upon Form 4789 to say that Defendant Wilmot should have been aware of the law. In fact, Form 4789 did not correctly state the law at that time. The aggregation principle did not go into effect until the revised 31 C.F.R. 103.22 was properly promulgated, April 1987. See also, United States v. Reinis, 794 F.2d 506 (9th Cir. 1986); United States v. Richter, 610 F.Supp. 480, 489 (D.C. Ill. 1985), aff'd. 793 F.2d 1296 (7th Cir.), cert. denied, 479 U.S. 855 (1986). The directions contained in Form 4789, not having been promulgated pursuant to the Administrative Procedure Act, constitute no more than interpretive rules which cannot impose a legal duty. Gimbel, 830 F.2d at 626.

The Eighth Circuit Court of Appeals rejected the position of the Seventh and Ninth Circuits and followed those circuits that have allowed similar prosecutions to proceed.[1]

Given the fact that learned judges of the Circuit Courts of Appeal have differences of opinion with respect to this issue, defendant Wilmot submits that in 1984, 31 C.F.R. § 103.22 was

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[1] The panel cites a variety of cases from other circuits which it purports to follow. United States v. Farm & Home Savings Association, 932 F.2d at 1259. Although the Eighth Circuit cites a Ninth Circuit decision as supporting its decision, United States v. Hayes, 827 F.2d 469 (9th Cir. 1987), the facts in Hayes are distinguishable because in that case the defendant arrived at the bank with a bag containing $113,500 in cash which a bank official helped structure into multiple transactions. Id. at 471-72. Likewise, the First Circuit opinion cited by the panel is distinguishable because the defendant presented multiple checks to the same bank teller at one time which totaled over $10,000. United States v. Bank of New England, 821 F.2d 844, 850--51 (1st Cir.), cert. denied, 484 U.S. 943 (1987). The split in the circuits is not as lopsided as the panel would have the casual reader believe.

entirely deficient to apprise him of the state of the law. A statute or regulation requiring the filing of a CTR that is so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential element of due process of law." Lanzetta, 306 U.S. at 453. Because the decision of the Eighth Circuit is in direct conflict with the decisions of other Circuit Courts of Appeal, this Court should grant the Petition for a Writ of Certiorari. Sup. Ct. R. 10.1 (1991).

CONCLUSION

Petitioner Fred Wilmot respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-198 CR(3)

UNITED STATES OF AMERICA,
Plaintiff,

v.

FARM AND HOME SAVINGS ASSOC., et al.,
Defendants.

ORDER

This matter is before the Court on motions to dismiss Counts I, III, and IV of the superseding indictment, filed by defendants Wilmot, Williams, Meyer and Miller, on the grounds that defendants were not under any duty to file currency transaction reports with respect to the transactions alleged in the superseding indictment.[1] For the reasons set forth below defendants' motions will be granted in part and denied in part.

Pursuant to 28 U.S.C. § 363(b), the pretrial matters were referred to United States Magistrate William S. Bahn for review and recommendation. Magistrate Bahn held a hearing on the motions to dismiss and recommended denial. Defendants objected and requested a de novo hearing thereon. On May 31, 1990, the Court took evidence and heard oral argument on the motions. Based on the arguments of counsel and materials

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[1] Count II was dismissed by this Court on May 24, 1990, for improper venue. Court V charges defendant Wilmot with perjury in connection with the investigation of these charges, and is not the subject of the motions presently before the Court.

submitted at the hearing, the Court makes the following findings, for the purpose of these motions only.

The superseding indictment alleges the following: In 1984, defendants Meyer and Williams, and an IRS special undercover agent met with defendant Wilmot, senior vice president of the Farm & Home Savings and Loan branch in the Dallas, Texas metropolitan area. After leaving Wilmot's office, Meyer and Williams purchased a total of $120,000 in money orders at three separate Farm & Home branches in the Dallas, Texas area. No CTRs were filed on these transactions.

Thereafter, defendant Wilmot telephoned James Besher, the senior vice president of Farm & Home branches in the St. Louis, Missouri metropolitan area. Defendants Meyer and Miller then had a conversation with Besher, after which Meyer and Miller purchased several money orders each under $10,000, but all totalling more than $10,000. No CTRs were filed on these transactions.

The superseding indictment charges defendants with failing to file currency transaction reports or causing them not to be filed (31 U.S.C. §§ 5313 and 5322 and 18 U.S.C. § 2) and with wilfully concealing a material fact from the Department of Treasury in regard to the St. Louis transactions (18 U.S.C. § 1001) (Count IV); and with conspiring to violate the currency transaction reporting statute and regulations which require the filing of such reports in connection with the transactions in St. Louis, and Dallas (18 U.S.C. § 371) (Counts I and III).

At the time of the events alleged in the indictment, the currency reporting regulations promulgated pursuant to the authority established in 31 U.S.C. § 5313 provided as follows:

> Each financial institution shall file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which

> involves *a transaction in currency of more than $10,000.* Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

31 C.F.R. § 103.22(a) (emphasis added).

In 1987, the regulation was changed as follows:

> Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any business day.

Defendants argue that because the Reporting Act and implementing regulations, in effect in 1984, spoke only in terms of "a transaction" of more than $10,000, CTRs were not required to be filed in a situation where an individual purchased in excess of $10,000 in separate money orders from a financial institution in one day, and the bank was not required to aggregate the individual transactions in arriving at the reporting figure of more than $10,000. Defendant Wilmot further argues that the allegations in the superseding indictment pertaining to him do not allege a crime against the United States.[2]

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[2] Defendant Wilmot also argues that his statements to defendants Meyer and Williams (which were electronically recorded and a transcript of which was introduced into evidence at the hearing) of his understanding of the requirements of the federal banking regulations with respect to the filing of currency transactions was accurate, and cannot be considered criminal activity. In deciding a motion to dismiss an indictment, the Court is restricted to the allegations contained in the indictment. Accordingly, the Court makes no determination as to whether these conversations constitute criminal activity.

In order to be valid, an indictment must allege that the defendants performed acts which if prove, constitute violations of the laws as charged. "If the acts *alleged in the indictment* do not constitute a violation of law, the indictment is properly dismissed." *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1988) (emphasis added).

Moreover, in addressing the motions to dismiss, the Court does not write on a clean slate, but is guided in its decisionmaking by the principles established in the Eighth Circuit opinions of *Polychron*, 841 F.2d 833 (8th Cir. 1988) (addressing issues of customer liability under the Reporting Act), and *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986) (addressing issues of a bank official's liability under the Reporting Act),[sic]

In *Larson*, the bank customer made numerous monetary transactions at four different bank branch locations, each slightly less than $10,000, in an attempt to avoid the reporting requirements of 31 U.S.C. § 5313. The government charged the customer with concealing material facts from the government in violation of 18 U.S.C. § 1001; and because his structured transactions caused the banks to fail to file CTRs, the government also charged defendant with aiding and abetting in violation of 18 U.S.C. § 2. The district court held defendant's conduct violated the law and convicted him of concealing material facts and aiding and abetting.

On appeal, the Eighth Circuit reversed, holding that (1) defendant could not be guilty of concealing material facts unless there was a duty to disclose the facts, and (2) the Reporting Act imposed no duty on a customer to disclose his conduct to the banks. The Court also reversed the conviction for aiding and abetting, noting that "if the banks were unaware that [defendant] was structuring his transactions, then they committed no offense by failing to file CTRs." *Larson*, 796 F.2d at 247.

In light of *Larson*'s holding that the Reporting Act imposes no duty on a customer to disclose his conduct to the banks, the Court finds that the allegations against defendant-customers Meyer, Williams, and Miller do not constitute a violation of law. Thus, the portion of the superseding indictment charging defendants Meyer, Williams, and Miller with concealing a material fact in violation of 18 U.S.C. § 1001, will be dismissed.

Nevertheless, to the extent the indictment alleges defendants aided and abetted in the non-filing of CTRs in violation of 18 U.S.C. § 2, the Court finds that a trier of fact could find from the allegations in the superseding indictment that the customer-defendants spoke with two senior vice presidents of Farm & Home, and that therefore the bank was aware of defendants' structuring. Therefore, the[sic] that extent defendants' motions to dismiss will be denied.

In *Polychron*, the indictment alleged that an unindicted customer deposited over $140,000 in a bank account, and instructed the bank president to withdraw the full amount in cash withdrawals of less than $10,000 each until the account was depleted. The customer provided the president with signed, blank withdrawal slips. The president made 15 withdrawals in all, and on two days made two withdrawals, each under $10,000, but together totalling more than $10,000. No CTRs were filed on these transactions.

The indictment charged the bank president with two counts of failing to file CTRs or causing them not to be filed; with concealing material facts from the Department of Treasury with regard to those transaction[sic]; and with conspiring to violate the Reporting Act and its regulations. The district court granted defendant's motion to dismiss holding that the bank had no duty to report the transactions because the statute and implementing regulations applied only to individual transfers of currency in excess of $10,000 and did not require the aggregation of indi-

vidual same-day transaction. On appeal, the Eighth Circuit reversed, holding that the Reporting Act sufficiently apprised the bank president that when a bank "employee acting within the scope of his employment structures an otherwise reportable transaction into multiple transactions in a single day that do not individually exceed $10,000, the bank, or its officer or employee may be held criminally responsible for failing to file or causing the bank to fail to file a CTR." *Polychron*, 841 F.2d at 837. Accordingly, the appellate court held that the indictment charging a bank president with intentionally structuring transactions in order to avoid the statutory filing requirements in violation of 18 U.S.C. §§ 2 and 1001, sufficiently alleged a crime against the United States.

The government argues that *Polychron*, stands for the proposition that a bank official is criminally liable if he is "involved in" or "has knowledge of" a customer's structuring of transactions. The Court is not persuaded by the government's argument. The *Polychron* court referred repeatedly to Polychrons'[sic] "structuring the withdrawal," drew a distinction between a customers structuring a withdrawal and a bank *structuring* a withdrawal, and cited several cases from other circuits involving a bank or bank official's actual assistance in or structuring of a transaction. Moreover, although the 1987 regulations require a financial institution to report multiple currency transactions totalling more than $10,000 during any business day *if it has knowledge that they are by or on behalf of any single person*, the Court finds that such was not required by the regulations in effect prior to 1987.

The superseding indictment in this case does not charge defendant Wilmot with "intentionally structuring transactions in order to avoid the statutory filing requirements," or with conspiring to structure transactions in order to avoid the statutory filing requirements." Defendant Wilmot's conduct, as alleged in the superseding indictment differs significantly from the bank presi-

dent's alleged complicity in the structuring of the customers transactions set forth in *Polychron*. The Court will address the Counts in reverse order, dealing with the substantive count first, and the conspiracy counts second.

Count IV, charging defendants with the substantive violation of 18 U.S.C. § 1001 in connection with the St. Louis transactions alleges only that

(1) defendant Wilmot was the senior vice president of the Farm & Home in Dallas, and

(2) that as part of the scheme defendant Wilmot telephoned James Besher to inform him that defendant Meyer and other individuals would be contacting him.

The Court finds that even if proved, these allegations do not sufficiently alleged a crime against the United States.

Count III charging defendants with conspiring to violate 18 U.S.C. § 1001 by causing the non-filing of CTRs in connection with the St. Louis transactions contains no additional allegations in support of the underlying substantive offense. Accordingly, the Court finds Count III does not sufficiently allege a crime against the United States.

Count I, charging defendants with conspiring to violate 18 U.S.C. § 1001 by causing the non-filing of CTRs in both St,[sic] Louis, and Dallas[ ]Texas, alleges only that

(1) defendant Wilmot was the senior vice president responsible for all of Farm & Home Savings Association's branches in the Dallas, Texas metropolitan area; and

(2) defendants Wilmot, Meyer, Williams, and special agent Thompson had a conversation in Wilmot's office at the North Dallas, Texas branch of Farm &

Home Savings Association, after which defendants Meyer and Williams purchased the money orders in question; and

(3) James Besher, not named as a defendant in the indictment had a telephone conversation with defendant Wilmot.

The Court finds these allegations, even if proved, do not sufficiently allege a substantive crime against the United States.

Accordingly,

IT IS HEREBY ORDERED that the Magistrate's recommendation is overruled in part and sustained in part.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss Counts I, III, and IV of the superseding indictment filed by defendants Meyer, Williams, and Miller is granted as to the charge that they concealed, or conspired to conceal material facts from the government, and denied as to the charge that they aided or abetted, or conspired to aid or abet in the non-filing of CTRs.

IT IS HEREBY FURTHER ORDERED that defendant Wilmot's motion to dismiss Counts I, III, and IV of the superseding indictment for failure to allege any crimes against the United States is granted as to this defendant.

/s/ William L. Hungate
UNITED STATES
DISTRICT JUDGE

Dated: 6-27-90

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2223

United States of America,
Appellant,

v.

Farm & Home Savings Association,
Thomas A. Williams, Ronald Meyer,
Appellees,
Ronald Whitaker, Fred Wilmot and
Leon Miller a/k/a Lee Miller,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 17, 1991
Filed: May 13, 1991

Before LAY, Chief Judge, MAGILL and LOKEN,
Circuit Judges.

LOKEN, Circuit Judge.

The United States appeals from the district court's dismissal of most of counts I, III, and IV of a multi-count indictment charging appellees and others with violations of the reporting requirements of the Bank Secrecy Act of 1970 (the "Act") and its

implementing regulations, 31 U.S.C. § 5313(a) and 31 C.F.R. Part 103. In dismissing these portions of the indictment, the district court distinguished our prior decision in *United States v. Polychron*, 841 F.2d 833 (8th Cir.), *cert. denied*, 488 U.S. 851 (1988). We conclude that the conduct charged in the indictment, if proved, would violate the Act as construed in *Polychron*. Accordingly, we reverse.

The indictment alleges that defendants Thomas A. Williams, Ronald Meyer, and Ronald Whitaker each purchased money orders totaling more than $10,000 from three branches of defendant Farm & Home Savings Association in Dallas on September 26, 1984; and that Meyer and defendant Leon Miller each purchased money orders totaling more than $10,000 from three St. Louis branches of Farm & Home on November 28, 1984. The Dallas purchases were made with the "knowledge, acquiescence and consent" of defendant Fred Wilmot, then a Senior Vice President of Farm & Home in Dallas, and the St. Louis purchases were made with the "knowledge, acquiescence and counsel" of James Besher, then a Senior Vice President of Farm & Home in St. Louis, who was not named as a defendant. Pursuant to an alleged conspiracy among all the defendants, Farm & Home did not file Currency Transaction Reports ("CTRs") with respect to any of these purchases, as allegedly required by the Act.

After defendants Farm & Home and Whitaker pleaded guilty to certain of the charges and the district court dismissed Count II of the indictment, relating to the Dallas purchases, for lack of venue, the remaining defendants — bank customers Williams, Meyer and Miller and bank officer Wilmot — moved to dismiss Counts I, III and IV.[1] Count I charges these defendants, the

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[1] Count V of the indictment charged Wilmot with giving false testimony before a St. Louis grand jury investigating possible violations of the Act by Farm & Home and its officers. Count V was not dismissed but is not otherwise relevant to this appeal.

appellees before this court, with conspiracy to violate the Act in violation of 18 U.S.C. § 371. Count III charges appellees with knowingly and willfully causing Farm & Home to fail to file CTRs in connection with the St. Louis money order purchases, in violation of 31 U.S.C. §§ 5313 & 5322 and 18 U.S.C. § 2. Count IV charges appellees with knowingly and willfully concealing the material facts that would have been disclosed to the Internal Revenue Service had CTRs been filed in connection with the St. Louis purchases, in violation of 18 U.S.C. §§ 1001 & 2.

The district court dismissed all charges against appellees Wilmot, the Texas bank officer, because the indictment failed to alleged that he had engaged in the deliberate structuring of the St. Louis transactions to avoid the CTR reporting requirement. The district court also dismissed the charge that appellees Meyer, Williams and Miller violated § 1001 on the ground that these bank customers had no duty to disclose their structured transactions to Farm & Home under this court's decision in *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986). However, the district court held that the indictment properly charges the customer appellees with aiding and abetting, and conspiring to aid and abet, the nonfiling of CTRs in violation of the Act because it is alleged that Farm & Home was aware of their structuring of the St. Louis purchases.

I.

A fundamental threshold issue in this case is whether, under the Act and regulations in effect in 1984, the facts alleged in the indictment imposed on duty on Farm & Home to file one or more CTRs reflecting the St. Louis money order purchases. The indictment alleges that the customer defendants purchased multiple money orders totaling more than $10,000, but less than $10,000 each, from three branches of Farm & Home on the day

in question. In 1984, the regulations[2] required Farm & Home to file a CTR in connection with "each . . . transfer . . . which involves a transaction in currency of more than $10,000," 31 C.F.R. § 103.22(a). The instructions to Treasury Department Form 4789, the CTR report, advised financial institutions that, "Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them." However, the statute and regulations were not amended to expressly cover such "multiple transactions" until after the 1984 events here in question occurred. Therefore, appellees argue, Farm & Home had no duty to file CTRs in connection with the St. Louis purchases and appellees cannot be charged with *any* crimes in connection with those purchases under this court's decision in *Larson*.

In *Larson*, we held that a bank customer who purchased ten cashier's checks at four bank branches on the same day, for the purpose of avoiding the filing of CTRs, was not liable for concealing material facts from the government in violation of 18 U.S.C. § 1001, or of aiding and abetting a violation of the Act in violation of 18 U.S.C. § 2, because the banks were unaware of the structured transactions and thus had no duty to file CTRs. 796 F.2d at 247. Although other circuits have held to the contrary, *see, e.g., United States v. Cure*, 804 F.2d 625, 629 (11th Cir. 1986), we have consistently adhered to our decision in *Larson*.

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[2] The Act requires a domestic financial institution, such as Farm & Home, to "file a report . . . at the time and in the way the Secretary [of the Treasury] prescribes" in connection with each currency transaction "in an amount . . . or under circumstances the Secretary prescribes by regulation," § 5313(a). Willful failure to file is punishable under § 5322(a) and (b). Thus, the Secretary's regulations define the scope of a bank's reporting duties under the Act. See generally *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 37-41, 57-59 (1974), which upheld the constitutionality of the Act.

Subsequent to *Larson*, we considered whether the Act's reporting requirements in effect in 1984 would be violated if a bank officer affirmatively structured a currency transaction, either on his own behalf or on behalf of a bank customer, in order to avoid causing the bank to file a CTR. In *United States v. Polychron, supra*, we held that a bank officer who "structures an otherwise reportable transaction into multiple transactions in a single day that do not individually exceed $10,000" may be criminally liable for causing the bank to fail to file a CTR. 841 F.2d at 837. In *Pilla v. United States*, 861 F.2d 1078 (8th Cir. 1988), we upheld the conviction of a bank advisory board member who, with the assistance of a bank officer, structured cash transactions in excess of $10,000 with the bank on behalf of a purported drug dealer, without the filing of CTRs. Following *Polychron*, we held that Pilla's relationship with the bank gave him a duty to report the transactions; moreover, unlike the bank in *Larson*, the bank was aware of the duty to report because a bank officer was Pilla's co-conspirator. *Id.* at 1081.

In this case, the indictment alleges that appellees Meyer and Miller agreed with Besher, the Farm & Home officer in St. Louis, to cause Farm & Home to fail to file CTRs, and that Miller and Meyer purchased money orders in amounts in excess of $10,000 per person per day without the filing of CTRs "with the knowledge, acquiescence and counsel" of Besher. The district court held that the bank had no duty under *Polychron* to file CTRs in this situation because the bank customers, Miller and Meyer, rather than the bank officer, Besher, actually "structured" the transaction. We disagree. Where the indictment alleges this level of knowledge and participation by a responsible bank employee, we think it immaterial to the bank's duty to report that the money order purchases were physically handled by the

customers at various bank branches. These allegations if proved[3] would establish that the bank knew that one or more transactions in excess of $10,000 per day were being structured in an attempt to evade Farm & Home's reporting requirements under the Act. This is sufficient to impose a duty on the bank to file CTRs under *Polychron*, which in this regard is consistent with the cases from nearly every circuit that has considered the question. *See United States v. Bank of New England*, 821 F.2d 844, 850-51 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987); *United States v. Heyman*, 794 F.2d 788, 792 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986); *United States v. American Investors*, 879 F.2d 1087, 1098-1099 (3d Cir.), *cert. denied*, 110 S. Ct. 368 (1989); *United States v. Thompson*, 603 F.2d 1200, 1203-04 (5th Cir. 1979); *United States v. Hayes*, 827 F.2d 469, 472 (9th Cir. 1987); *United States v. Cook*, 745 F.2d 1311, 1315-16 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985); *United States v. Cure*, 804 F.2d 625, 627-28 (11th Cir. 1986). *Contra, United States v. Risk*, 672 F. Supp. 346, 357-58 (S.D. Ind. 1987), *aff'd*, 843 F.2d 1059, 1061-62 (7th Cir. 1988). Appellees' principal argument on appeal is, in effect, that we should reject this nearly uniform line of authority and overrule *Polychron*. We decline to do so.

II.

With this threshold issue resolved, we now turn to the specific crimes charges in Counts I, III and IV of the indictment.

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[3] In reviewing the sufficiency of an indictment, we accept the government's allegations as true, without reference to allegations outside the indicting document. *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 & N.16 (1952); *United States v. Von Barta*, 635 F.2d 999, 1002 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981)

Count I — The Conspiracy

Count I alleges that appellees and their co-defendants willfully and knowingly conspired (i) to defraud the United States by obstructing the governmental function of collecting data through CTRs; (ii) to cause Farm & Home to fail to file CTRs; and (iii) to conceal material facts in a matter within the jurisdiction of the Treasury Department. To state a conspiracy violation under 18 U.S.C. § 371, the government must allege "(1) an agreement to commit an illegal act; (2) an unlawful objective; and (3) an act done in furtherance of the conspiracy committed by at least one of the participants." *United States v. Cerone*, 830 F.2d 938, 944 (8th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

The district court correctly held that the Count I charges are sufficient as to appellees Meyer, Williams and Miller. The alleged participation of bank officer Besher in the scheme, if proved, would establish that Farm & Home had a duty under *Polychron* to file CTRs in connection with the St. Louis money order purchases. In *Polychron*, the dismissal of a conspiracy count against the participating bank officer was reversed. Likewise, here, the motion to dismiss the conspiracy charges against these bank customers was properly denied. *See also United States v. American Investors, supra*, 879 F.2d at 1100-1103; *United States v. Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985).

The district court dismissed Count I as to appellee Wilmot on the ground that the specific acts alleged "even if proved, do not sufficiently allege a substantive crime against the United States." We believe that this reflects too narrow a view of the alleged conspiracy.

With respect to Wilmot, the indictment alleges that defendants caused Farm & Home not to file CTRs in connection with the Dallas money order purchases "with the knowledge, acqui-

escence and consent and at the direction of" Wilmot (Count II);[4] that Wilmot and Besher had a telephone conversation before the St. Louis purchases (an alleged overt act); and that defendants then caused Farm & Home not to file CTRs in connection with the St. Louis purchases "with the knowledge, acquiescence and counsel of" Besher (Count IV). While only one of the 34 overt acts alleged in Count I relates specifically to Wilmot, that one, his telephone conversation with Besher, forges a potentially significant link between what might otherwise be separate Dallas and St. Louis conspiracies. Moreover, Count I charges all defendants, including wilmot, with willful and knowing conspiracy to commit the violations alleged. Under these circumstances, Count I was sufficient as to Wilmot. As we said in *United States v. Thomas*, 759 F.2d 659 (8th Cir. 1985):

> The essence of a conspiracy is the agreement, and once a defendant's participation has been established he is culpable for everything said or done by any of the other conspirators in furtherance of the conspiracy.

Id. at 668.

Count III — The Substantive Violations of the Act

Meyer, Williams and Miller. Count III alleges that the customer appellees violated 31 U.S.C. §§ 5313 and 5322 and 18 U.S.C. § 2 by causing Farm & Home to fail to file CTRs for money order purchases in excess of $10,000 per person per day at three Farm & Home branches in St. Louis. The district court held that the indictment sufficiently alleges that these appellees

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[4] Under *Polychron*, because of Wilmot's alleged participation, Count II properly alleged violations of the Act in connection with the Dallas purchases if venue was proper; the government has not appealed the district court's dismissal of Count II for lack of venue.

violated 18 U.S.C. § 2 by aiding and abetting in the non-filing of CTRs in violation of 31 U.S.C. § 5313, because Farm & Home was aware of the wrongful structuring of the transaction by reason of the "knowledge, acquiescence and counsel" of Besher. As the above discussion makes clear, this was a correct application of *Polychron*.

Wilmot. The district court dismissed Count III as to Wilmot because, unlike the bank officer in *Polychron*, the indictment does not charge *him* with "intentionally structuring transactions in order to avoid the statutory filing requirements," and because the specific facts alleged as to Wilmot "do not sufficiently allege a crime against the United States." We disagree. As discussed above, it was the alleged participation of Besher, not Wilmot, that imposed a duty on Farm & Home to file CTRs in connection with the St. Louis transactions. Count III alleges that Wilmot knowingly and willfully aided and abetted this St. Louis reporting violation. Though Wilmot could not be charged with the substantive offense of failing to file CTRs in connection with the St. Louis transactions, because he had no duty as a Dallas officer of Farm & Home to do so, he may be charged with aiding and abetting such an offense if he "in some way associated himself with the criminal venture as something he wished to bring about and . . . sought by his actions to make it succeed." *United States v. American Investors, supra*, 879 F.2d at 1103. Thus, Count III sufficiently alleges a violation of 18 U.S.C. § 2 by Wilmot.

Count IV — The § 1001 Violation

Count IV alleges that appellees violated 18 U.S.C. §§ 1001 and 2 by concealing from the government, "by scheme and device," the facts that would have been disclosed had CTRs been filed in connection with the St. Louis purchases. The district court dismissed this Count as to the customer defendants based upon the holding in *Larson* that bank customers have no duty to disclose their conduct to banks, and as to Wilmot because this

Count "does not sufficiently allege a crime against the United States."

We agree that, under *Larson*, the alleged § 1001 violations were properly dismissed as to these defendants because they had no duty to disclose information to the government by filing CTRs. However, Count IV also accuses them of aiding and abetting a § 1001 violation by Farm & Home, in violation of § 2. In *Larson*, the § 2 conviction was reversed because "the banks were unaware that Larson was structuring his transactions," 796 F.2d at 247. Here, on the other hand, Count IV alleges that bank officer Besher participated in the "scheme and device" to cause Farm & Home to conceal information from the government by failing to file CTRs. Thus, as to the § 2 charge in Count IV, like the § 2 charge in Count III, this case is distinguishable from *Larson*.

It is now settled that the charge of failing to file a CTR in violation of 31 U.S>C. § 5313, and the charge of concealing the facts called for on the report in violation of 18 U.S.C. § 1001, are distinct crimes having distinct elements of proof that may be separately punished. *See United States v. Woodward*, 469 U.S. 105, 108-09 (1985) (per curiam). An additional question, however, is whether this indictment adequately charges the bank defendants with knowingly and willfully concealing or covering up a material fact "by any trick, scheme, or device" in violation of 18 U.S.C. § 1001.

We do not examine this issue in a vacuum. In *United States v. Shannon*, 836 F.2d 1125 (8th Cir.), *cert. denied*, 486 U.S. 1058 (1988), defendant was a bank chairman who obtained a large cash loan, deposited the cash in the bank's correspondent account at another bank, and then transferred the money from that account to his personal use, all without the filing of any CTRs. Distinguishing *Larson*, this court affirmed Shannon's conviction for failing to cause the filing of CTRs, based upon his

position of control at the first bank. However, we affirmed the dismissal of a charge that he also violated 1001 by concealing facts from the second bank which caused it to fail to file a CTR:

> To establish a concealment violation of section 1001, the government must prove more than just a passive failure on the part of the defendant to reveal a material fact. Rather, the government must prove an affirmative act by which a material fact is actively concealed. Here . . . there was no evidence that the defendant took affirmative steps to conceal these facts from [the second bank].

836 F.2d at 1129-1130 (citations omitted).

In this case, the indictment alleges that the customer appellees, who were in the same relationship to Farm & Home as defendant was to the second bank in *Shannon*, adopted an elaborate plan involving numerous individuals, *including Besher, a senior officer of Farm & Home*, to ensure that facts were not disclosed to the government through the filing of CTRs by Farm & Home. Whether this plan as implemented constituted the affirmative steps necessary under *Shannon* to violate 18 U.S.C. § 1001 may well be a close question. But we think it is properly a question for the jury. The indictment, as it must, pleads the necessary elements of the § 1001 offense by Farm & Home and Besher, and fairly informs the customer defendants of the aiding and abetting charges they must defend. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Under these circumstances, the § 2 violations alleged in Count IV of the indictment should not be dismissed as to the customers because it fails further to define the "scheme and device" alleged; it is for the jury and the trial court to determine whether appellees' conduct fell within the statutory proscription. *See United States v. London*, 550 F.2d 206, 213 (5th Cir. 1977). For the same reasons, we conclude that Count IV sufficiently charges Wilmot with violating 18 U.S.C. § 2 by knowingly and willfully participating in the scheme and device to conceal.

Accordingly, the order of the district court dismissing portions of Counts I, III and IV of the indictment is reversed.

A true copy.

Attest:

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(2) (2) (2)

Nos. 91-90, 91-161 and 91-264

In the Supreme Court of the United States

OCTOBER TERM, 1991

RONALD MEYER AND LEON MILLER A/K/A LEE MILLER, PETITIONERS

v.

UNITED STATES OF AMERICA

FRED WILMOT, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS A. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order dismissing portions of three counts of a multi-count indictment on the ground

that the conduct charged, if proved, would not violate the Bank Secrecy Act of 1970, 31 U.S.C. 5313(a).

1. On November 8, 1989, petitioner Wilmot, a bank officer, and petitioners Meyer, Miller, and Williams, bank customers, were indicted by a grand jury sitting in the United States District Court for the Eastern District Missouri. They were charged in three counts of a superseding indictment with conspiracy to violate the Bank Secrecy Act of 1970 and to defraud the United States, in violation of 18 U.S.C. 371; causing the Farm & Home Savings Association to fail to file Currency Transaction Reports (CTRs), in violation of 31 U.S.C. 5313 and 5322; and concealing material facts that would have been disclosed to the Internal Revenue Service had CTRs been filed, in violation of 18 U.S.C. 1001.[1] Among other things, the indictment alleged that the customer petitioners purchased multiple money orders totaling more than $10,000, but less than $10,000 each, from three branches of Farm & Home on September 26, 1989, "with the knowledge, acquiescence and counsel" of a bank officer.

On June 27, 1990, the district court dismissed the three counts against petitioner Wilmot on the ground that the indictment did not allege that he had engaged in the deliberate structuring of the transactions to avoid the CTR reporting requirement. The district court also dismissed the charge that petitioners Meyer, Miller, and Williams violated 18 U.S.C. 1001 on the ground that they had no duty to disclose their structured transactions to Farm & Home Saving. The court held that the bank had no duty to file CTRs because the bank cus-

[1] Petitioner Wilmot was also charged, in a count not here relevant, with giving false testimony before the grand jury.

tomers rather than the bank officer structured the transaction. 91-90 Pet. App. A13-A20.

The court of appeals reversed. 91-90 Pet. App. A1-A11. The court held that since the indictment alleges knowledge and participation by a responsible bank employee, it is immaterial to the bank's duty to report that the money order purchases were physically handled by the customers at various branches. In the court's view, these allegations, if proved, would establish that the bank knew that one or more transactions in excess of $10,000 per day were being structured in an attempt to evade Farm & Home's reporting requirements under the Act.

2. Petitioners Meyer, Miller, and Williams contend (91-90 Pet. 5-6; 91-264 Pet. 10-17, 22-25) they were not given fair notice of the reporting requirements, and that the prosecution is an ex post facto application of the statute. Petitioner Wilmot contends (91-161 Pet. 8-13) that his prosecution violates due process because neither the statute nor the regulations require a bank official to file a CTR where no single transaction exceeds $10,000. Petitioners also contend (91-90 Pet. 6; 91-161 Pet. 14-16; 91-264 Pet. 18-21) that the court of appeals' decision conflicts with decisions of other circuits. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of cer-

tiorari seeking review of the final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

AUGUST 1991

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[2] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petitions. We will file a response on the merits if the Court requests.

Supreme Court, U.S.
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(3)

No. 91-161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRED WILMOT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY OF PETITIONER FRED WILMOT TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Government suggests, without citation of authority, that Fred Wilmot's Petition for a Writ of Certiorari[1] should be denied because the case is not ripe for review by this Court. Memorandum for the United States in Opposition at 3. The Government argues that Mr. Wilmot must first undergo the ordeal of a criminal trial before he can seek review in this Court of a final decision of the Eighth Circuit Court of Appeals. This case is ripe for review and the Petition for Writ of Certiorari should be granted.

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[1] Fred Wilmot's Petition for a Writ of Certiorari contains his Rule 29.1 statement at page ii thereof. Sup. Ct. R. 29.1 (1991).

This Court has jurisdiction to review by writ of certiorari the decision of the Eighth Circuit Court of Appeals. 28 U.S.C. § 1254. The Government argues, however, that this case is not ripe because "[i]f petitioners are acquitted following a trial on the merits, their contentions will be moot." Memorandum for the United States in Opposition at 3. This Court has stated in determining that a matter was ripe for review that "[o]ne does not have to await the consumation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

In *Wayte v. United States*, 470 U.S. 598 (1985), this Court granted certiorari to a case coming before it in a similar posture. The petitioner in *Wayte* was indicted for willfully failing to register with the Selective Service. *Id.* at 603. The indictment was dismissed by the District Court, *Id.* at 604-05, and the dismissal was reversed on appeal. *Id.* at 606. "Recognizing both the importance of the question and a division in the Circuits" this Court granted certiorari. *Id.* at 607.

Including *Wayte*, this Court has granted certiorari on at least four occasions, between 1971 and the present, in cases in the same posture as that of Mr. Wilmot. *The Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978); and *Sefass v. United States*, 420 U.S. 377 (1975). *See Bland v. United States*, 412 U.S. 909 (1973) (Justices Douglas, Brennan & Marshall dissenting from denial of writ of certiorari) (case in same posture). Prior to 1971 this Court had direct appellate jurisdiction from a district court's dismissal of an indictment. 18 U.S.C.A. § 3731, Historical and Revision Notes.

CONCLUSION

This case is ripe for review. The Government, without citation of authority, asks this Court to abandon its established practice of reviewing decisions coming before it in the same posture. Petitioner Fred Wilmot respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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